IN THE

# *Supreme Court of the United States*

October Term, 1975

No. 75-1887

DAVID L. JONES, etc., et al.,

Petitioners

v.

ROBERT E. X. CARROLL,

Respondent

V. L. BOUNDS, etc., et al.,

Petitioners

v.

WILLIAM FLOYD JOHNSON, JR.,

Respondent

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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## INDEX



## APPENDIX



## TABLE OF CASES

STATUTES INVOLVED





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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this consolidated proceeding on March 31, 1976.

## OPINION BELOW

The opinion of the United States Court of Appeals for the

Fourth Circuit entered March 31, 1976, is not yet reported and is printed as Appendix A to this Petition. (A pp 17-26).

## JURISDICTION

The jurisdiction of this Court is evoked under 28 U.S.C. § 1254 (1).

## QUESTIONS PRESENTED

I. WHETHER A PRISON INMATE WHO IS TRANSFERRED WITHIN A STATE FROM ONE MEDIUM SECURITY INSTITUTION TO ANOTHER MEDIUM SECURITY INSTITUTION, WITHOUT THE IMPOSITION OF DISCIPLINARY PUNISHMENT, ENTITLED UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND THE REQUIREMENTS OF WOLFF v. McDONNELL, 418 U.S. 539 (1974) TO NOTICE OF THE REASONS FOR THE TRANSFER AND AN OPPORTUNITY TO BE HEARD.

II. WHETHER THE OPINION OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT IS CONSISTENT WITH WOLFF v. MvDONNELL, SUPRA, AND BAXTER v. PALMIGIANO, ... U.S. .... ...., 44 U.S.L.W. 4487 (April 20, 1976).

III. WHETHER THE FOURTH CIRCUIT COURT OF APPEALS ERRED IN CONCLUDING THAT WOLFF v. McDONNELL, SUPRA APPLIES TO A RECLASSIFICATION OR TRANSFER WHICH "MAY SUBJECT THE INMATE TO POTENTIALLY MATERIALLY ADVERSE EFFECTS."

IV. WHETHER THE FOURTH CIRCUIT COURT OF APPEALS ERRED IN CONCLUDING THAT WOLFF v. McDONNELL, SUPRA, IS RETROACTIVE TO RECLASSIFICATIONS AND TRANSFERS WHICH TOOK PLACE AFTER JUNE 26, 1974.



## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States.

## STATEMENT OF THE CASE

These consolidated cases arose out of like claims asserted by Robert E. X. Carroll and William Floyd Johnson, Jr., inmates of the North Carolina Department of Correction, to the effect that their intra-system transfers and/or reclassifications occurred without being afforded that degree of procedural due process required by WOLFF v. McDONNELL, 418 U.S. 539 (1974). In an opinion filed March 31, 1976, the Fourth Circuit held that, under the guiding principles of WOLFF v. McDONNELL, that "the standards established by [WOLFF v. McDONNELL and KIRBY v. BLACKLEDGE, .... F. 2d ...., No. 73-2236 (4th Cir., January 19, 1976)] require that an inmate subject to reclassification or transfer which took place after June 26, 1974, and which imposed a 'major change in the conditions of confinement' of the inmate, be afforded the hearing rights prescribed by WOLFF." The Court concluded that "even if the transfers were administrative, they should not, in this Court's opinion be exempted from the 'major change' approach." "While some courts have indicated that WOLFF may be applicable only to punitive transfers, other courts have concluded that it is often difficult factually to determine if the particular transfer is punitive or administrative. Additionally, they have indicated that WOLFF standards should be applied if the transfer, whether it be punitive or administrative, *may subject the inmate to potentially materially adverse effects. That latter approach would appear preferable and is adopted by this Court.*"[1] (Emphasis added.)

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According to information provided to the Fourth Circuit Court of Appeals by Ralph S. Strickland, Director of Management Information of the North Carolina Department of Correction, there were 34,800 transfers within the Division of Prisons of the North Carolina Department of Correction in 1974. These transfers included initial

## CARROLL v. JONES

### No. 75-1069

On October 25, 1974, Robert E. X. Carroll filed yet another pro se complaint in the United States District Court for the Middle District of North Carolina, Greensboro Division.[2]

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2
See CARROLL v. TURNER, No. C-89-G-72 (M.D.N.C., March 22, 1972); CARROLL v. TURNER, Civil No. 3058 — Raleigh (E.D. N.C., August 1, 1972); CARROLL v. TURNER, Civil No. 3067 — Raleigh (E.D.N.C., August 1, 1972); CARROLL v. OUTLAND, Civil No. 4002 — Raleigh (E.D. N.C., September 22, 1972); CARROLL v. BROWN, Civil No. A-72-80 (W.D.N.C., September 22, 1972); CARROLL v. BROWN, Civil No. 72-CVD-4182 (Buncombe County Superior Court, June 26, 1973); CARROLL v. BOUNDS, Misc. No. 125 (W.D.N.C., October 24, 1972); CARROLL v. TURNER, Civil No. 4080 — Raleigh (E.D.N.C. January 19, 1973); CARROLL v. BOUNDS, Civil No. A-C-73-18 (W.D.N.C., August 30, 1973); CARROLL v. JONES, No. 74-107-CRT — Raleigh (E.D.N.C. August 1, 1974); CARROLL v. JONES, No. 74-137-CRT (E.D.N.C., September 11, 1974); CARROLL v. ZANTHOS, No. M-74-199 (M.D.N.C., December 23, 1974); CARROLL v. JONES, No. 74-166-CRT (E.D.N.C. December 9, 1974); CARROLL v. BROWN, No. C-75-98-G (M.D.N.C., March 21, 1975); CARROLL v. JONES, No. C-75-117-G (M.D.N.C., April 2, 1975); CARROLL v. SHEPHERD, No. C-75-283-

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fn. 1 (cont'D)
assignments, transfers for the convenience of the inmate or to meet the needs of the Department, transfers as a result of promotion or demotion in custody level, temporary transfers to Central Prison Hospital for physical, dental, or psychiatric evaluation and treatment, etc. Further, he indicated that there are 77 units and institutions in which prisoners are housed in the custody of the Department of Correction. He further advised that as of November 19, 1975, there were 12,518 persons in the custody of the Department.

The 77 units which constitute the Division of Prisons of the North Carolina Department of Correction are located in 67 different counties, stretching from the Currituck Subsidiary in the east to the Haywood Subsidiary in the west, a distance of 475 miles. Fifteen of these units house less than 100 prisoners. Fifty from 100 to 200 prisoners, and ten house over 200 prisoners. The reason for this diffusion of facilities and wide distribution of the prison population is the desire of the State to facilitate work release and other rehabilitative programs and, whenever feasible, to keep prisoners near their families and within home counties, hopefully calculated to aid in their subsequent successful reentry into society.



In this Complaint he complained of being transferred from the Caswell County Subsidiary at Yanceyville, North Carolina to the Caledonia Correctional Institution at Tillery, North Carolina, without the benefits of due process—although apparently also complaining about the conditions of confinement at the Caswell County Subsidiary. In this Complaint he scatters contentions like buckshot, saying on one hand that he was transferred in order to inhibit his access to the courts and on the other hand "so that he could write all the writs he wanted."

On December 23, 1974, the District Court, *sua sponte*, filed an Order dismissing the Complaint. Carroll appealed and the Fourth Circuit Court of Appeals concluded that, under the guiding principles of WOLFF v. McDONNELL, that although "[i]t is not clear whether Carroll's transfer from one medium custody institution to another medium custody institution resulted in a major change in the conditions of his confinement. Certain facts alleged by Carroll do appear to indicate that Carroll's transfers may have been administrative rather than punitive. However, even if the transfers were administrative, they should not, in this Court's opnion be exempted from the 'major change's approach. While some courts have indicated that WOLFF may be applicable only to punitive transfers, other

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fn. 2 (cont'D)
G (M.D.N.C., July 8, 1975); CARROLL v. JONES, No. C-75-346-G (M.D.N.C., August 19, 1975).

Thus, after a plenary hearing in CARROLL v. TURNER, No. C-89-G-72 (M.D.N.C.), Chief Judge Eugene A. Gordon felt compelled to state the following:

> "A final comment concerning this case is in order. Plaintiff in this action is a frequent litigant in this Court as well as the District Courts of the Eastern and Western Districts of North Carolina. He has brought eleven actions in the Middle District alone, including four in the first five months of this year, and advised the Court that he is presently preparing for filing another petition. The Court is convinced that the Plaintiff refused to shave solely for the purpose of creating a colorable § 1983 claim. *Federal court litigation is merely a hobby for Inmate Carroll — a game he plays to help pass the time.*" (Emphasis added.)

courts have concluded that it is often difficult factually to determine if the particular transfer is punitive or administrative. Additionally, they have indicated that *WOLFF standards should be applied if the transfer, whether it be punitive or administrative, may subject the inmate to potentially materially adverse effects. That latter approach would appear preferable and is adopted by this Court. . . .*"[3] (Emphasis added.)

JOHNSON v. BOUNDS

No. 75-1867

On July 13, 1973, William Floyd Johnson, Jr., commenced a pro se action in the United States District Court for the Eastern District of North Carolina pursuant to 42 U.S.C. § 1983 alleging that on June 8, 1973 he was transferred from the Odom Correctional Institution to Central Prison in Raleigh where he spent his first twelve days on "lockup". The District Court dismissed the Complaint for failure to state a claim upon which relief could be granted and Johnson moved for an amended judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. Upon reconsideration of the Complaint and a study of the caselaw, the District Court filed its opinion August 20, 1973, concluding that the previous Order should stand unaltered.

On August 24, 1973, Johnson filed Notice of Appeal.

The Fourth Circuit concluded that "While pre-WOLFF standards are hardly well defined, they would appear to require at the very least, a response by the Defendants containing sufficient information to establish that the action complained of by the inmate was not so egregiously unfair as to require re-

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The Fourth Circuit Court of Appeals did not define what constituted "potentially materially adverse effects." Thus, it would appear that every transfer could be the subject of litigation and the trial court would be forced to subjectively weigh the facilities, programs and location of the sending and receiving institutions in order to determine whether or not the transfer "may subject the inmate to potentially materially adverse effects."



lief. Accordingly, the JOHNSON case is hereby remanded for futher proceedings below."

However, the dismissal in JOHNSON v. BOUNDS, No. 4365 — Raleigh (E.D.N.C., August 20, 1973), was only the opening shot — and not the end of the battle as Respondent Johnson led the Circuit Court to believe. On July 25, 1973, William Johnson, together with the 11 other inmates who had been transferred with him from Odom to Central filed McLAMB, et al. v. SANDERS, Civil No. 4380—Raleigh (E.D.N.C.), raising the identical issues which he previously raised in JOHNSON v. BOUNDS, supra. In fact, in McLAMB v. SANDERS, supra, Johnson filed an Affidavit in opposition to the Defendants' Affidavits in support of their Motion for Summary Judgment and also moved for appointment of counsel. He also moved the Court and obtained an Order extending the time within which he might respond to Defendants' Motions to Dismiss and for Summary Judgment until October 10, 1973. On December 20, 1973, the District Court filed an extensive Order denying the Plaintiffs' claims for relief and granted the Defendants' Motion for Summary Judgment. However, on September 10, 1973, Johnson had filed yet another civil rights action again presenting the identical contentions. JOHNSON v. LEWIS, Civil No. 4439 — Raleigh (E.D.N.C.). Once again the State responded and on December 4, 1973, the District Court filed yet another Order granting the Defendants' Motion for Summary Judgment — reserving one issue for further litigation. By Order filed February 21, 1974, the remaining issue, relating to the publications regulation of the Department of Correction was resolved.

In JOHNSON v. LEWIS, supra, District Judge Dupree held:

> . . . as regards Plaintiff's transfer to Central Prison on June 8, 1973, and the concomitant body search and seizure of various toiletries, the record clearly indicates sufficient basis for the action of the Defendants. The United States District Court for this District has previously held that the

identical transfer procedure of other inmates on the same day for the same reason was reasonable under the existing circumstances and thus not violative of the constitutional rights of the inmates there involved. GRANT v. BOUNDS, Civil No. 4371 (E.D.N.C., October 12, 1973). The GRANT decision clearly governs the June 8, 1973 transfer of Plaintiff herein. Specifically regarding the fact that the transfer to Central Prison occurred prior to the hearing ultimately held, the record shows the transfer to have been made for the purpose of maintaining order at the transfering institution. Such transfer is not unconstitutional. . . .[4]

In GRANT v. BOUNDS, Civil No. 4371 — Raleigh (E.D. N.C., October 12, 1973), Chief Judge John D. Larkins, Jr., in reviewing the identical contention of one of the other twelve inmates transferred from Odom Correctional Institution to Central Prison with Johnson on June 8, 1973, held that:

"Prior to June 8, 1973, a critical situation was developing at Odom Correctional Institution. There was a movement among the inmates to stop or disrupt farm work projects. Many inmates refused to work and there was danger of an institution wide strike. There were agitators who were circulating among their fellow inmates encouraging them to refuse to work. The situation threatened to spread . . . Prison officials conferred and decided that immediate action had to be taken. The Regional Classification Committee convened and determined which inmates that should be referred to the Central Classification Board for possible reassignment. Plaintiff was one of the inmates selected to be transferred to Central Prison to be personally interview-

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The Court of Appeals failed to recognize the doctrine of res adjudicata, in that Johnson had litigated completely, resulting in an unfavorable decision on identically the same issues involving the same parties. The principles of res adjudicata are fully applicable to § 1983 actions. PREISER v. RODRIQUEZ, 411 U.S. 475, 497 (1973).



ed by the Central Classification Board. Mr. C. T. Caudle, Superintendent of the Odom Correctional Institution, informed each of these inmates of the action that was being taken. Also, Mr. F. K. Sanders, Regional Superintendent, personally informed the 12 inmates of the reason for the action before they were transferred to Raleigh. The transfer of State prisoners from one State institution to another is peculiarly within the scope of administration of the state penal system. VERDE v. CASE, supra. Plaintiff's constitutional rights were not violated because of this transfer. Prison officials acted reasonably in transferring these inmates from Odom in order to prevent a crisis.[5]

## REASONS FOR GRANTING THE WRIT

## THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS CONFLICTS WITH THE DECISION OF THIS COURT IN WOLFF v. McDONNELL, SUPRA, AND BAXTER v. PALMIGIANO, SUPRA, AND IF CARRIED TO ITS LOGICAL END, WOULD REQUIRE A DUE PROCESS HEARING IN EVERY ADMINISTRATIVE TRANSFER.

In reliance on what it conceives to be the holding of WOLFF v. McDONNELL, supra, the Fourth Circuit Court of Appeals has determined that "WOLFF standards should be applied if the transfer, whether it be punitive or administrative, may subject the inmate *to potentially materially adverse effects.*" (Emphasis added.) Thus, ". . . a prison inmate subject to reclassification or transfer which took place after June 26, 1974, and which imposed a 'major change in the conditions of confinement' of the inmate, [must] be afforded the hearing rights prescribed by WOLFF." Carried to its logical end, this theory requires notice and hearing before every administrative transfer, since the facilities are not fungible and each has its own

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It must be clearly noted that this is a pre-WOLFF transfer taking place on June 8, 1974. WOLFF is expressly not retroactive.

personality dependent upon its location in the state, facilities, type and age of construction, and availability of various programs and educational resources. The consequences of such a theory are absurb and certainly not compelled by the Constitution.

Although a serious disadvantage may accompany even an administrative transfer, the practical necessities of prison administration require that the administrative decision to transfer an inmate remain within the sound discretion of prison authorities. By "administrative" transfer, we mean one that is based fully on proper administrative and correctional criteria, and not on an inmate's institutional behavior. In a truly administrative transfer, the reasons for transfer are extrinsic to the inmate's prison behavior, and the decision to transfer will generally not be improved at all by providing notice and a hearing to the transferee.

A nondisciplinary transfer is closely akin to the initial determination of the place and specific facility for confinement which, in the North Carolina Department of Correction, is wholly vested in the Secretary of the Department of Correction. With all of the complexities of penology, sociology and criminology, much of which is in a state of undulating flux even for those expert in the field, courts and judges are not equipped to decide such matters. Obviously, no due process hearing is called for in selecting the institution of confinement by those charged with operational responsibility.

This Court's decisions clearly establish that there is no independent liberty interest created merely because an individual perceives suffered loss at the hands of the government. "The range of interests protected by procedural due process is not infinite." BOARD OF REGENTS v. ROTH, 408 U.S. 564, 570 (1972). For example, in ROTH, this Court recognized that the teacher's continued employment was of substantial "interest" to him (id. at 570), but held that it was not constitutionally significant since no liberty or property interest was



implicated. Similarly, injury to one's reputation may be of great importance to the individual effected and may be sufficient to prevail in a state defamation action, but reputational injury, absent more, does not implicate a liberty or property interest protected by the Due Process Clause. PAUL v. DAVIS, ... U.S. ..., 44 U.S.L.W. 4337 (March 23, 1976). The Fourth Circuit's simplistic conversion of a reclassification or transfer which "may subject the inmate to potentially materially adverse effects" into a "grievous loss" implicating the requirements of WOLFF, acknowledges that the Circuit Court really does not understand the WOLFF decision. The Due Process Clause does not extend to all governmental action which is adverse or is perceived as adverse by a particular individual but only to that action which affects a protected interest otherwise established.

A decision to reclassify or transfer an inmate does not deprive him of liberty; his liberty was withdrawn by his conviction. And, the speculation that a reclassification or transfer notation might effect future rights of the inmate does not vest an inmate with procedural rights at the time of reclassification or transfer.

The question in WOLFF was whether the protections of due process extend to prison disciplinary proceedings that may result in the reduction of prisoner's statutory good time credits or placement in punitive segregation. But this Court's decision did not turn upon the mere fact that a reduction in good time credits might effect the timing of the prisoner's release, i.e., it did not turn upon the simple identification of release from prison with constitutionally protected liberty. Instead, this Court focused narrowly on the nature and source of the prisoner's interest and the retention of his accumulated good time credits. Since that interest was created by statute and by statute could be extinguished only "in cases of flagrant or serious misconduct" (418 U.S. at 546), this Court concluded that "the prisoner's interest has real substance and is sufficient-

ly embraced within the Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state created right is not arbitrarily abrogated;" (418 U.S. at 557).

In BAXTER v. PALMIGIANO, supra, this Court reiterates the holding of WOLFF in an apparent attempt to eliminate the confusion currently rampant in the lower federal courts in the application of WOLFF.

> "Finally, the Court of Appeals for the Ninth Circuit in No. 74-1194 held that minimum due process — such as notice, opportunity for response, and statement was necessary where inmates were deprived of privileges. 510 F. 2d, at 615. We did not reach the issue in WOLFF; indeed, we said '[w]e do not suggest, however, that the procedures required by today's decision for the deprivation of good time would also be required for the imposition of lesser penalties such as a loss of privileges' 418 U.S., at 572 n. 19. Nor do we find it necessary to reach the issue now in light of the record before us . . ."BAXTER v. PALMIGIANO, ... U.S. ..., 44 U.S.L.W. at 4492.

Transfers may be made for a number of reasons:

> "It may be for 'security' if . . . it is predicated on the apprehension of general uncontrollable disturbance or on predictions of future misconduct by an inmate. It may be for the best interests of other inmates if the prisoner is disruptive, a threat to others, or otherwise a bad influence . . . A transfer may be for the best interest of the prisoner himself, for his safety or for his rehabilitation if it is believed that he will be better off elsewhere. And a transfer may be dictated by the needs or shortcomings of the institution, e.g., to alleviate overcrowding." GOMES v. TRAVISONO, 490 F. 2d 1209, 1214 (1st Cir. 1974).

We add that transfers may also be justified by the inmate's need for medical care, or to move him to appear before a classification board or disciplinary committee, or to move him to an institution closer to his point of release or more appropriate in light of the time remaining to be served. In almost all of these cases transfers may be predicated not only on proof of supporting facts, but also upon a reasonable subjective belief (or even suspicion) that such supporting facts are present. Many of the causes for transfers simply are not susceptible of objective delineation — such as the safety of the inmate or the institution — although theoretically objectifiable, are so important that officials may be compelled to act before suspicions can ripen into proof.



The Second Circuit Court of Appeals analysed the problem well in SOSTRE v. McGINNIS, 442 F. 2d 178, 197 (en banc), cert. denied *sub nom.* SOSTRE v. OSWALD, 404 U.S. 1049:

> It is sad but true that the study of the prison subculture by psychologists and sociologists has until recently been largely neglected. Those who have looked into the problem, however, do not gainsay the volatility of relationships between prisoners and prison officials . . . We would not presume to fashion a constitutional harness of nothing more than our guesses. It would be mere speculation for us to decree that the effect of equipping prisoners with more elaborate constitutional weapons against . . . prison authorities would be more soothing to the prison atmosphere and rehabilitative of the prisoner or, on the other hand, more disquieting and destructive of remedial ends. This is a judgment entrusted to state officials, not federal judges.

For quite different reasons, WOLFF hearings are unsuitable for decisions involving transfers to different rehabilitative programs at different institutions. The important factual questions in making such transfer decisions relate either to the program at the transferring institution (a subject unlikely to be enlightened by contributions from the inmate) or to the inmate's personal prognosis. Although the inmate surely has an impor-

tant contribution to make to the later, it is most appropriately made in diagnostic interviews and personal performance under observation in prison recreation and employment, and in communications that are incorporated in reports which are an integral part of the transfer decision. The inmate's contributions cannot usefully be made in adversary hearings in response to notice of "charges".

Still other transfer decisions involve specific facts. When a prisoner is transferred because of overcrowding, for example, the most relevant facts concern the comparative population density of the two involved institutions; because the inmate cannot meaningfully contribute to the resolution of any factual dispute about these conditions, trial-type hearings should not be constitutionally required. Where a hearing cannot serve the purpose for which it is designed, it is not inflexibly required by the Constitution.

In 1974, 34,800 transfers took place in the North Carolina Department of Correction. Nationally, in the state and federal systems, the number must reach hundreds of thousands of transfers each year. And yet, the Fourth Circuit simplistically requires that "WOLFF standards should be applied if the transfer, whether it be punitive or administrative, *may subject the inmate to potentially materially adverse effects.*" (Emphasis added.) In other words, in order to comply, WOLFF-type procedures would be required in each and every decision to move an inmate from one institution to another, regardless of the needs of the institution or the good faith administrative decisions of the correctional officials.

Furthermore, by holding that WOLFF standards are applicable when a transfer "may subject the inmate to potentially materially adverse effects" and concluding that this standard is applicable to reclassifications or transfers which took place after June 26, 1974, the date this Court announced the WOLFF decision, the Fourth Circuit Court of Appeals has opened a Pandora's Box of litigation—the extent of which could overwhelm the federal courts and totally disrupt the functioning of correctional systems.



## CONCLUSION

The decision of the Fourth Circuit in the application of the WOLFF doctrine in this case extends well beyond the intent of this Court. It is clear that this Court's holdings in WOLFF and BAXTER do not envision the conclusion reached in the case at bar. The application of extensive due process requirements to administrative transfers which "*may subject the inmate to potentially materially adverse effects,*" is not the situation to which he decision in WOLFF applies. (Emphasis added.)

A civil servant sent to Alaska, a soldier sent to Viet Nam, or a prisoner sent to another institution, may in a private sense, suffer "grievous loss", but the nature of the organization and their role precludes acknowledging any "liberty" or "property" right to remain in one location. And, obviously, if a municipal police officer can be discharged without notice and hearing unless he has vested rights in governmental employment, BISHOP v. WOOD, ... U.S. ..., 44 U.S.L.W. 4820 (June 8, 1976), how can a prison inmate say that he has a property right to remain in a prison in which he has been temporarily placed?

The Fourth Circuit Court of Appeals erred not only in applying WOLFF as it did, but, also, in holding that WOLFF applies retroactively to all such situations. Any one of the questions presented, much less in combination, present questions of immediate, vital importance, not only to the North Carolina Department of Correction, but also to the administrators of the correctional systems of our sister states and the United States Bureau of Prisons. We believe that the questions submitted are truly substantial and present to this Court far-reaching issues of vital importance that must be answered if

correctional administrators are to retain any control whatsoever.

Respectfully submitted,

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# Appendix A
## *United States Court of Appeals*
### FOR THE FOURTH CIRCUIT

No. 73-2159

DONALD BENFIELD,

Appellant,

versus

VERNON BOUNDS, etc, et al.,

Appellees.

No. 75-1069

ROBERT E. X. CARROLL,

Appellant,

versus

DAVID L. JONES, etc., et al.,

Appellees.

No. 75-1867

WILLIAM FLOYD JOHNSON, JR.,

Appellant,

versus

V. L. BOUNDS, etc., et al.,

Appellees.

No. 75-1868

LEROI DENSON,

Appellant,

versus

DEPARTMENT OF CORRECTIONS, etc.,

Appellee.

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Appeals from the United States District Court for the Eastern District of North Carolina, Raleigh Division (Nos. 73-2159 and 75-1867), from the United States District Court for the Middle District of North Carolina, Greensboro Division (No. 75-1069), and from the United States District Court for the Eastern District of Virginia, Richmond Division (No. 75-1868).

(Argued December 1, 1975 Decided Mar. 31, 1976

Before HAYNSWORTH, Chief Judge, CRAVEN, Circuit Judge, and KAUFMAN,* District Judge

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Deborah G. Mailman, Court-Appointed Counsel for Appellants in Nos. 75-1867, 75-1069 and 75-1868 (Jack Greenberg and Stanley A. Bass on brief for Appellant in No. 73-2159); Jacob L. Safron, Special Deputy Attorney General of North Carolina, and (Rufus L. Edmisten, Attorney General of North Caroiina, on brief) for Appellees in Nos. 73-2159, 75-1069 and 75-1867; Burnett Miller, III, Assistant Attorney General of Virginia, and (Andrew P. Miller, Attorney General of Virginia, on brief) for Appellee in No. 75-1868.

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*Sitting by Designation

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KAUFMAN, District Judge:

In these four cases each of the plaintiffs, three of them confined in North Carolina correctional institutions and one, Denson, in such a Virginia institution, appeal from denial of relief sought in connection with transfers and/or reclassifications. Each of them, proceeding *pro se*, has alleged that his intra-confinement system transfers and/or reclassifications occurred without his being afforded that degree of procedural due process required by *Wolff v. McDonnell*, 418 U.S. 539 (1974).[1] In *Kirby v. Blackledge*, ... F.2d ..., No. 73-2236 (4th Cir. January 19, 1976), this Court has recently held that the requirements of

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While certain other claims have been made by plaintiffs Benfield, Carroll and Denson, they do not appear to state meritorious grounds for relief. The denial of those claims by the court below is therefore hereby affirmed in *Benfield*. In *Carroll* upon remand, those claims should however be further examined by the court below and ruled upon expressly. In *Denson*, plaintiff's double jeopardy claim is referred to *infra* in the body of this opinion.



*Wolff* relating to intra-prison disciplinary proceedings are applicable with regard to intra-prison reclassifications. In *Kirby*, the actions complained of by the inmates allegedly resulted in each of them being subjected to conditions of confinement less favorable to them.[2]

The Supreme Court's disposition of *Wolff* took place on June 26, 1974. In *Wolff* (at 573-74), Mr. Justice White made clear that the Court's decision in *Wolff* was not to be accorded retroactive effect. In *Cox v. Cook*, 420 U.S. 734 (1975), the Supreme Court again made that crystal clear as we have recognized in *Williams v. Bounds*, No. 75-2380 (4th Cir. January 2, 1976), *Russell v. Division of Corrections*, No. 75-1441 (4th Cir. December 16, 1975), and *Perry v. Bordenkircher*, No. 74-1957 (4th Cir. June 25, 1975).

All four plaintiffs are in confinement at this time. While none of them is now confined in the same location to which he was transferred or reclassified, each of them seemingly contends that the transfer and/or reclassification of which he complains continues on his record and either presently or in the future may adversely affect him within the confinement system in which he is an inmate. Accordingly, even if damage claims are not involved,[3] none of the within four cases would appear moot, particularly in the absence of any notation, among plaintiffs' institutional records, of the type referred to in *Preiser v. Newkirk*, 422 U.S. 395, 402 (1975), indicating that one or more of their transfers " 'should have no bearing in any future determinations made by the Board of Parole or the time allowance committee.' "

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*See* Wolff v. McDonnell, *supra* at 571-72 n.19. Whether the "rationale of *Wolff*" applies to initial classifications is an issue noted but not decided in Williams v. Bounds, No. 75-2380 (4th Cir. January 2, 1976). The record in *Kirby* discloses that it involved reclassifications, not initial classifications.

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*See* Powell v. McCormack, 395 U.S. 486, 495-97 (1969); Burke v. Levi, No. 75-1695 (4th Cir. November 12, 1975).

## BENFIELD

Benfield's complaints relate to his transfers within the North Carolina prison system in June 1971, between November 1971 and March 1972, between March 1972 and June 1972, between August 1972 and January 1973, and in June 1973. Benfield seeks injunctive and declaratory relief, but not damages.

The record in *Benfield* includes reponses by defendants and a number of affidavits which, together with Judge Dalton's careful factual exploration as set forth in his opinion in the court below, establish that in June 1971 defendants were in receipt of what they described as "reliable information . . . from outside sources" that Benfield, whose record reveals seven felonies and four escapes, had arranged, for purposes of escape, to have two pistols smuggled into the confinement institution then housing him. One loaded automatic was found within the prison walls. Thereafter, Benfield and a second inmate were transferred to another institution. Although no charges were preferred against him, Benfield was subsequently orally informed in July 1971 at an appearance before a classification board of the reason for his transfer. Benfield denied any involvement with the gun matter, both then and in November 1971 when he once again appeared before a classification board.

In March 1972, after a pipe wrench had been found at the institution at which Benfield was then confined, and after an inmate had given information that both a wrench and an automatic pistol had been smuggled in, an investigation was undertaken by the institution's officials. The pistol was not found. Benfield volunteered to take a lie detector test but that test was not administered, at first because Benfield was on certain prescribed medication. However, although the medication was discontinued for a five-day period, the test was not administered during those five days. Thereafter, the medication was resumed and the test was not given. Judge Dalton has noted: "Defendants have not indicated why the test was not administered to the plaintiff." Seemingly, the test could have been given to Benfield during the five-day period.



Benfield also submitted to a classification board sworn affidavits of two inmates that another inmate was overhead by them, in a conversation with a custodial officer, to admit that that latter inmate had falsely charged Benfield in connection with the March 1972 pistol episode. Also, Benfield again denied involvement in that matter when he appeared before a classification board in June 1972. That board, however, decided to keep Benfield in the medium custody arrangements then pertaining to him. In August 1972, after the institution then housing Benfield changed its medium cusody policies, Benfield, after another appearance before a classification board, was determined in need of more supervision than would have been available in medium custody after the change in policy and was transferred to close custody.

Each time Benfield appeared before a classification board, he was apparently informed of the reasons for his appearance and afforded the opportunity to present his side of the matter, but was not given notice and hearing of the type mandated by *Wolff*. In June 1973, the classification board assigned Benfield to medium custody in another institution, noting "his good adjustment" but concluding that because of "his history of escapes and the previous 2 incidents", *i.e.*, the two weapon smuggling matters referred to *supra*, "it was the feeling of the Board that Benfield was in need of a very structured situation."

All of the actions of which Benfield complains took place before June 26, 1974. Thus *Wolff* does not control as to them. Nor does Judge Dalton's grant of defendants' motion for summary judgment offend pre-*Wolff* standards in the context of the facts of this case. As *Wolff* and *Kirby* recognize, an inmate should be afforded a relatively high degree of procedural due process before he is reclassified and placed in more restrictive custody because of alleged actions on his part, in order to enable him to present fully his side of the factual and legal issues.

In Benfield's case, it would have been preferable if *Wolff* standards had been effective in 1971, 1972 and 1973 and had enabled Benfield to have had the opportunity to proceed within the bounds of such process. But the overwhelming burden which would be imposed on prison officials if they were required presently to reexamine past reclassifications and transfers, such as those involving Benfield, of all inmates now in custody demonstrates the wisdom of the Supreme Court's determination not to make *Wolff's* application retroactive. That is not to say that pre-*Wolff* standards require reviewing courts to refuse relief in cases in which reclassification and/or transfer resulted from egregiously discriminatory or arbitrary conduct on the part of prison officials.[4] But the treatment accorded to Benfield in no way approaches that level. Accordingly, the grant of summary judgment by the district court is hereby affirmed in Benfield's case.

## JOHNSON

Johnson, complaining of a June 1973 transfer which allegedly occurred without his being informed of any reason for the same, seeks declaratory and injunctive relief and also damages. The district court dismissed the complaint without requiring a response. The facts which can be gleaned from Johnson's complaint are very sparse. While pre-*Wolff* standards are hardly well defined, they would appear to require, at the very least, a response by the defendants containing sufficient information to establish that the action complained of by the inmate was not so egregiously unfair as to require relief. Accordingly, the *Johnson* case is hereby remanded for further proceedings below.

## CARROLL

Carroll, asking for declaratory and injunctive relief and dam-

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"Classifcation of inmates is a matter of prison administration and management with which federal courts are reluctant to interfere except in extreme circumstances." Williams v. Bounds, *supra* (4th Cir. January 2, 1976). That comment was written in the context of pre-*Wolff* law.



ages, complains of transfers in October and December 1974, as well as other alleged denials of constitutional rights. The district court dismissed the complaint without requiring any response from defendants. *Wolff* and *Kirby* are both applicable in this case. In this Court's view, the standards established by those two cases require that a prison inmate subject to reclassification or transfer which took place after June 26, 1974, and which imposed a "major change in the conditions of confinement" of the inmate,[5] be afforded the hearing rights prescribed by *Wolff*. In this case it is not clear whether Carroll's transfer from one medium custody institution to another medium custody institution resulted in a major change in the conditions of his confinement. Certain facts alleged by Carroll do appear to indicate that Carroll's transfers may have been administrative rather than punitive. However, even if the transfers were administrative, they should not, in this Court's opinion, be exempted from the "major change" approach. While some courts have indicated that *Wolff* may be applicable only to punitive transfers,[6] other courts have concluded that it is often difficult factually to determine if a particular transfer is punitive or administrative. Additionally, they have indicated that *Wolff* standards should be applied if the transfer, whether it be punitive or administrative, may subject the inmate to potentially materially adverse effects.[7] That latter approach would appear

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5
Wolff v. McDonnell, *supra* at 571-72 n.19.

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6
*See* Aikens v. Lash, 514 F.2d 55, 58-59 (7th Cir. 1975); Stone v. Egeler, 506 F.2d 287 (6th Cir. 1974); Haymes v. Montanye, 505 F.2d 977 (2d Cir. 1974), *cert. granted*, 43 U.S.L.W. 3681 (June 30, 1975).

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7
*See* Lokey v. Richardson, .... F.2d ...., No. 74-1256 (9th Cir. December 9, 1975); Carlo v. Gunther, 520 F.2d 1293, 1295 (1st Cir. 1975); Fano v. Meachum, 520 F.2d 374, 396 n.2 (1st Cir. 1975), *cert. granted*, 44 U.S.L.W. 3339 (December 8, 1975); Gomes v. Travisano, 510 F.2d 537, 541 (1st Cir. 1975). *Cf* Newkirk v. Butler, 449 F.2d 1214, 1217-18 (2d Cir. 1974), *vacated on grounds of mootness*, 422 U.S. 395 (1975). The

preferable and is adopted by this Court. In this case, it requires a remand so that the district court can in turn require the defendants to respond to Carroll's allegations. Upon remand and after defendants do so further respond, the district court may itself determine whether it desires to await the decision of the Supreme Court in *Haymes v. Montanye*, 505 F.2d 977 (2d Cir. 1974), *cert. granted*, 43 U.S.L.W. 3687 (June 30, 1975), and *Fano v. Meachum*, 520 F.2d 374 (1st Cir. 1975), *cert. granted*, 44 U.S.L.W. 3339 (December 8, 1975). Those two cases are presently calendared by the Supreme Court for argument in tandem. The question presented to the Supreme Court in the petition for certiorari in *Haymes v. Montanye* is:

> Whether a prison inmate who is transferred within a state from one maximum security institution to another maximum security institution, without the imposition of disciplinary punishment, is entitled under the Due Process Clause of he Fourteenth Amendment to notice of the reasons for the transfer and an opportunity to be heard?

The questions presented in the petition for certiorari in *Fano v. Meachum* are:

> 1. Whether a prison inmate who is transferred, within a state, from a medium security institution to a maximum security institution, when there is no imposition of disciplinary punishment at the receiving institution, is entitled under the Due Process Clause of the Fourteenth Amendment to more than a notice of the proposed transfer and an opportunity to be heard in opposition to the transfer?
>
> 2. Whether the Commonwealth of Massachusetts has sufficiently created an interest in remaining in any one prison to be cognizable as "liberty" or "property" under the Fourteenth Amendment?

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First Circuit's comment in *Carlo* (at 1296) that "[n]or is it determinative that the transfer occurred within a single institution" is applicable in *Denson*.



> 3. Whether the Due Process Clause of the Fourteenth Amendment requires disclosure of informant information when, in the judgment of prison officials, such disclosure would create a substantial likelihood of harm to the informants?
>
> 4. Whether the opinion of the Court of Appeals for the First Circuit is consistent with opinions of this Court?

## DENSON

Denson, complaining of a reclassification within the same Virginia confinement institution, apparently seeks only equitable relief. Seemingly also, that reclassification occurred no earlier than during October 1974. Denson's *pro se* complaint reveals that he may have been given a hearing in connection with a disciplinary charge and found after such hearing to have committed an infraction of prison rules. However, Denson alleges he was not given another hearing prior to his reclassification. Judge Merhige, in the court below, dismissed Denson's complaint without calling for a response by defendants.

In *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971), Judge Merhige, well in advance of *Wolff*, required procedural due process in a prison disciplinary setting. In *Cousins v. Oliver*, 369 F. Supp. 553 (E.D. Va. January 14, 1974), Judge Merhige held that even though the prisoner-plaintiff had been afforded an appropriate hearing by an institutional adjustment committee and had been found to have violated prison regulations, nevertheless the prisoner was subsequently entitled, absent good reasons to the contrary, to a further classification hearing before a transfer to more restricted conditions of custody. Without reaching the issue decided by Judge Merhige in the *Cousins* case, this Court, in this case, in which post-*Wolff* standards prevail, hereby remands to the district court so that that Court may reconsider the *Wolff*-type issue after defendants have been required to respond to Denson's rather unclear complaint.[8]

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The district court may also, as suggested *supra* in the discussion re

Denson also asserts a double jeopardy claim, based on the fact that he was allegedly reclassified for the same incident for which he had been previously disciplined prior to his reclassification. That contention is without merit and need not be further considered by the district court upon remand.[9]

The judgment of the court below in *Benfield* is affirmed. The *Johnson*, *Carroll* and *Denson* cases are remanded for further proceedings in accordance with this opinion.

BENFIELD AFFIRMED; JOHNSON, CARROLL, AND DENSON REMANDED WITH INSTRUCTIONS.

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9

*See* Cousins v. Oliver, *supra* at 556; Almanza v. Oliver, 368 F. Supp. 981, 984 n.3 (E.D. Va. 1973). *Cf.* Fano v. Meachum, *supra* at 376 n.1 (no double jeopardy is involved where criminal prosecution follows disciplinary proceeding based on same conduct); Daigle v. Hall, 387 F.Supp. 652, 661-62 (D. Mass. 1975) (same).

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*Carroll*, desire, after defendants so respond, to await the Supreme Court's opinion in *Montanye* and *Fano*.

In The

# Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1887

**DAVID L. JONES,**

*Petitioner*

v.

**ROBERT E. X. CARROLL,**

*Respondent*

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**V. L. BOUNDS,**

*Petitioner*

v.

**WILLIAM FLOYD JOHNSON, JR.,**

*Respondent*

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## PETITIONERS' REPLY BRIEF

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES







STATUTES

In The

# Supreme Court of the United States

OCTOBER TERM, 1976

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No. 75-1887

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## PETITIONERS' REPLY BRIEF

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## INTRODUCTORY STATEMENT

Before presenting this Argument, we respectfully point out to the Court that several of the contentions raised by the Respondents' Carroll and Johnson in their Brief were not considered by the lower Court and therefore are not properly

before this Court. In his original Complaint, and in the response to the petition before this Court, Carroll raised many unrelated, conclusory contentions. The United States District Court for the Middle District of North Carolina dismissed the Complaint without a hearing. The United States Court of Appeals for the Fourth Circuit considered only Carroll's Complaint that the transfer from one medium custody facility to another medium custody facility violated his right to due process. *Benfield v. Bounds*, _____ F.2d ____, Nos. 73-2159 and 75-1867, (4th Cir. 1976).[1] It noted that Carroll had raised several other claims that "do not appear to state meritorious grounds for relief." (fn. 1 in *Benfield*, see petition, p. 18.) It did instruct the District Court to examine these contentions and to rule expressly upon the merits of each. However, the substantive question of whether due process applies to these transfers should be answered by this Court.

Johnson's response to the petition before this Court seeks to make "lock up" at Central Prison in Raleigh, North Carolina an issue in this case. Again, the United States Court of Appeals for the Fourth Circuit considered only Johnson's Complaint "of a June 1973 transfer which allegedly occurred without his being informed of any reason for the same." (petition, p. 22). The United States District Court for the Eastern District of North Carolina has dismissed the Complaint without requiring a response from correctional officials. Subsequently, the United States District Court for the Eastern District of North Carolina found his contentions without merit in identical cases. *Johnson v. Lewis*, Civil No. 4439 (E. D. N. C. 1973); *Grant v. Bounds*, Civil No. 4371

[1]The opinion of the United States Court of Appeals for the Fourth Circuit is included in the Petition for Certiorari, Appendix A, pp. 17-26.



(E. D. N. C. 1973). In spite of these rulings, the Fourth Circuit remanded the case to the District Court to determine what due process safeguards applied to lateral transfers prior to *Wolff v. McDonnell*, 418 U. S. 539 (1974).

In both cases then, it is clear that the fundamental issue before the Court is the applicability of the Due Process Clause to lateral transfers within the North Carolina Prison System. This Court should not be misguided by the Respondents' attempt to divert the Court from proper disposition of this case. For the reasons stated below, summary reversal is obviously appropriate in these cases.

## ARGUMENT

### THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IS CLEARLY INCONSISTENT WITH FANO v. MEACHUM, ____ U. S. ____, 95 S. CT. 2532 (1976) AND MONTAYNE v. HAYMES, ____ U. S. ____, 96 S. CT. 2543 (1976) AND THEREFORE MUST BE REVERSED.

As we have previously stated, Carroll originally claimed in his Complaint that he was transferred from the Caswell County Subsidiary at Yanceyville to the Caledonia Correctional Institution at Tillery without due process. Both units are medium custody facilities. Johnson alleged that he had been transferred without due process on June 23, 1973 from Odom Correctional Institution at Jackson, North Carolina to Central Prison to appear before the Central Classification Board of the North Carolina Division of Prisons at Raleigh, North Carolina. Both Odom and Central Prison are close custody facilities. Central Prison houses some maximum security inmates. Respondent Johnson never alleged however, that he was

demoted to maximum custody as a result of his transfer. He did allege that he had been placed in "lock up" at Central Prison for twelve days pending review of his housing assignment.

There had been a variety of responses to the question of the applicability of the Due Process Clause to the transfer of prison inmates prior to *Meachum* and *Montayne.*[2] The Fourth Circuit held that any transfer "whether it be punitive or administrative, that may subject an inmate to materially adverse affects" requires a due process hearing. To reach this result, the Court expanded *Wolff v. McDonnell* far beyond its intended boundaries. In *Wolff*, of course, this Court held that whenever an inmate is deprived of time credited on the service of his sentence for good behavior or is segregated "in solitary confinement" in accordance with statutes or regulations of the State of Nebraska, he must be afforded Due Process. In fn. 19 in *Wolff*, this Court stated:

> The deprivation of good time, and 'solitary confinement' are reserved for instances where serious misbehavior has occurred. This appears a realistic approach, for it would be difficult for the purposes of Procedural Due Process to distinguish between the Procedures that are required when good time is forfeited and those that must be extended when solitary confinement is at issue. The latter represents a major change in the conditions of confinement and is normally imposed only when it is claimed and proved that there has been a major act of misconduct. Here, as in the case of good time, there should be minimum procedural safeguards as a hedge against arbitrary determinations of factual predicate for imposition of the sanction.

[2] Some Courts had held Due Process applicable to disciplinary or punitive transfers. *Aikens v. Lash*, 514 F. 2d 55 (7th Cir. 1975); *Carroll v. Sielaff*, 514 F. 2d 415 (7th Cir. 1975); *Ault v. Holmes*, 506 F. 2d 288 (6th Cir. 1974); *Stone v. Egeler*, 506 F. 2d 287 (6th Cir. 1974). Others held that transfers of inmates do not call for Due Process Hearings. *Gray v. Craemer*, 465 F.2d 179, 187 (3rd Cir. 1972); *Hillen v. Director*, 455 F.2d 510 (9th Cir. 1975). Still others found it difficult to define "administrative" and "punitive" transfers. Thus they held that any transfer that adversely affected the inmate involved implicated the Clause. *Gomes v. Travisono*, 510 F. 2d 537, 541 (1st Cir. 1974); *Fano v. Meachum*, 520 F. 2d 374 (1st Cir. 1975). See *Meachum v. Fano*, fn. 6, supra.



It is absolutely clear that this Court was referring *only* to the penalties of loss of good time and confinement in "solitary confinement". The Fourth Circuit Court of Appeals, however, gave the phrase "major change in the conditions in confinement" an independent definition in spite of the fact that it obviously referred to "solitary confinement". Thus, the Fourth Circuit reasoned that a transfer to a less favorable prison environment required minimal Due Process. (See *Benfield v. Bounds*, supra, at pp. 18-19 of the Petition.)

Because of the obvious confusion about the applicability of the Due Process Clause to transfers, this Court agreed to resolve the question. *Fano v. Meachum* 520 F. 2d 374 (1st Cir. 1975), cert. granted, ____ U. S. ____, 44 U. S. L. W. 339 (1975). The decision of this Court in *Meachum v. Fano* is controlling in this case.

Respondent contends that the decisions of the Fourth Circuit holding Due Process applicable to the transfer of Johnson and Carroll are not inconsistent with *Wolff*. This contention is stated in Respondents' Brief in conclusory terms without supporting facts or logic for obvious reasons. No

substantive contentions can be raised. This Court in *Meachum*, expressly condemns the analysis of *Wolff* employed in these cases. There this Court pointed out that the State, not the Constitution,

> not only provided a statutory right to good time but also specified that it is to be forfeited only for serious misbehavior. *Meachum*, supra, quoting *Wolff* at 557.

This Court therefore concluded that

> since prisoners in Nebraska only lose good time credit if they are guilty of serious misconduct, the determination of whether such misbehavior has occurred becomes critical, and the minimum requirements of procedural Due Process appropriate for the States must be observed. *Meachum*, supra, quoting *Wolff* at 558.

Thus, the interest in *Wolff* had its roots in State law and not in the concept of "grievous loss". A "grievous loss" such as a "major change in the conditions of confinement" caused by a transfer with "materially adverse effects," (See *Benfield*, supra, at p. 18 of the Petition) is not sufficient to invoke the Clause.

> "to hold that any substantial deprivation imposed by prison authorities triggers the procedural protections of the Due Process Clause would subject to judicial review a wide spectrum of discretionary decisions that traditionally have been the business of prison administrators rather than the Federal Courts. *Meachum*, supra.



This Court's determinations regarding the reach of the Due Process Clause are controlling here.

> "The Due Process Clause by its own force forbids the State from convicting any person of crime and depriving him of his liberty without complying fully with the requirements of the Clause. But given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution . . . The conviction has sufficiently extinguished the defendant' liberty interest to impower the State to confine him in any of its institutions . . . That life in one prison is much more disagreeable than in another does not in itself signify that a Fourteenth Amendment liberty interest is implicated when a prisoner is transferred to the institution with more severe rules." *Meachum*, supra, at 2538.

There is nothing in Carroll's Complaint to indicate that his transfer was "punitive". As mentioned above, the District Court had twice previously found that the transfer of Johnson due to his role in creating a disturbance at Odom Correctional Institution was a valid administrative determination before the Fourth Circuit ruled in the instant cases. Assuming, *arguendo*, that both transfers may be regarded as "punitive", the Due Process Clause does not require hearings of any kind. *Montayne v. Haymes*, supra.

Although Johnson in the Brief submitted to this Court seeks to show that he was demoted and placed in punitive segregation, no such allegations appear in his original Complaint and none were considered by the United States

Court of Appeals for the Fourth Circuit. Again, they are not properly raised here. *Hormel v. Helvering*, 312 U. S. 552, 556 (1941). Assuming again that Johnson was demoted, this Court has recognized that a demotion is a necessary concomitant of a transfer to a "more disagreeable" institution. In *Moody v. Daggett*, ____ U. S. ____, 45 U. S. L. W. 4017 (November 15, 1976), this Court makes this fact abundantly clear. In *Moody*, a State prisoner had contended that pending warrants and detainers for parole violations affected his classification and eligibility for certain programs and that therefore, his revocation hearing could not be delayed. The Court replied to this Argument by noting that:

> "We have rejected the notion that every state action carrying adverse consequences for prison inmates automatically activates a Due Process Right. In *Meachum v. Fano*, ____ U.S. ____, for example, no due process protections were required upon the discretionary transfer of State Prisoners to a substantially less agreeable prison, even where that transfer visited a "grievous loss" on the inmate. The same is true of prisoner classification and eligibility for rehabilitative programs in the Federal System. Congress has given Federal Prison Officials full discretion to control these conditions of confinement, 18 U.S.C. § 4081, and petitioner has no legitimate statutory or constitutional entitlements sufficient to invoke Due Process."[3]

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[3]See also *Richardson v. Lokey*, ____ U. S. ____, 96 S. Ct. 3185 (1976) vacating and remanding *Lokey v. Richardson*, 527 F. 2d 949 (9th Cir. 1975) for consideration in light of *Meachum v. Fano*, supra. The Ninth Circuit held the Due Process Clause applicable to decisions regarding custodial classifications. This Court obviously felt its decision in *Meachum* compelled a different result.



It is clear then that a prisoner must show a liberty interest derived from the Constitution or State Laws of Regulations. Such an interest cannot be derived from the Constitution. *Meachum*, supra. The only remaining question then, is whether the laws of the State of North Carolina or the Regulations governing its prison system require Due Process Hearings upon transfers of inmates. They do not. N. C. General Statute §148-36 allows the Secretary of Correction "to designate the place of confinement where sentences of imprisonment in the State Prison System will be served." N. C. General Statute §148-4 provides that the Secretary "shall have control and custody of all prisoners." Thus, decisions of prison officials regarding custodial classifications are not subject to review. *Goble v. Bounds*, 281 N. C. 307, 188 S. E. 2d 347 (1972).

Respondents make a feeble attempt to show that Departmental Regulations required a hearing before Johnson could be "demoted" and placed in "punitive segregation".[4] These contentions are totally without merit. Johnson never alleges that he was demoted or placed in punitive segregation in his Complaint and these contentions were not considered by the Fourth Circuit Court of Appeals. Once again, they are not properly raised here. *Hormel v. Helvering*, supra. Johnson may have been placed in administrative segregation without the procedural requisites which accompany the enforcement of disciplinary punitive segregation. *Rivera v. Fogg* 371 F. Supp. 938 (W. D. N. Y. 1974); *Almanza v. Oliver*, 368 F. Supp. 981 (E. D. Va. 1974). Further, when prisoners are placed in administrative segregation for valid administrative reasons, they are not subjected to cruel and unusual

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[4]Respondents' refer to certain regulations, yet they are not attached to their Brief. Therefore, all pertinent regulations are attached for the court's convenience. See Appendix,

punishment in violation of the Eighth and Fourteenth Amendments to the Constitution simply because of the conditions inherent in maximum confinement. *Royal v. Clark*, 447 F. 2d 501 (5th Cir. 1971); *Krist v. Smith* 439 F. 2d 146 (5th Cir. 1971). There is nothing in Johnson's Complaint that indicates that the conditions in lock-up in Central Prison were "barbarous" or "shocking to the conscience". In short, he has not stated a viable claim under the Eighth and Fourteenth Amendments. *Sostre v. McGinnis* 442 F. 2d 178 (2nd Cir. 1971). It should also be noted that Departmental Regulations allow Institution Heads to place inmates in administrative segregation for a period not to exceed fifteen days when necessary "to protect staff and other inmates from the threat of harm." See 5 NCAC 2C.0300.

Finally, it should be noted that the Rules and Regulations of the Division of Prisons of the North Carolina Department of Correction were completely revised effective February 1, 1976. Some Regulations were updated while other Rules were drafted for the first time. It is impossible to tell from Respondents' Brief whether they are referring to Regulations that were in effect at the time of the transfer. In any case, it is abundantly clear that these Regulations do not provide Respondents with any vested right to a Due Process Hearing before a transfer or reclassification. The Regulations do authorize demotions out of minimum custody as a punishment for a major disciplinary infraction. See 5 NCAC 2B.0205(b)(3). However, nothing in the disciplinary regulations refers to transfers of any kind. Although counsel for Respondent has been furnished with a copy of the disciplinary regulations, she does not refer to any specific regulations to support her claim. We submit that no such regulations can be found.



## CONCLUSION

For the reasons stated in our petition and this Reply, we respectfully urge this Court to grant the Petition for the Writ of Certiorari and vacate the opinion of the Fourth Circuit Court of Appeals in light of *Meachum v. Fano* and *Montayne v. Haymes*.

Respectfully submitted,

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# APPENDIX

STATE OF NORTH CAROLINA
DEPARTMENT OF CORRECTION
DIVISION OF PRISONS

POLICIES – PROCEDURES

SUBJECT: DISCIPLINARY PROCEDURES

TAB: 5 NCAC 2B
INMATE CONDUCT RULES, DISCIPLINE

NO.: .0200

.0201 GENERAL

(a) Initial. Any member of the State Correction Service or other authorized person who witnesses what appears to be an act of misconduct by an inmate shall take appropriate action to prevent continuation of any actual misbehavior by that inmate. Counseling may be sufficient and should be tried when no additional action appears necessary to stop the misbehavior and prevent a recurrence. Assistance shall be obtained from other personnel when needed to enforce discipline with minimum risk to persons or property. The inmate shall be placed in administrative segregation only when this action appears to be necessary to control that inmate or to prevent further disorder.

(b) Reports. When an observer of apparent misconduct by an inmate concludes that counseling will not be sufficient action because the suspected offender does not appear responsive or because of the seriousness of the suspected offense or when an inmate observes serious misconduct, the observer should report the matter to the officer designated by the superintendent to investigate offenses committed.

(c) Investigations

(1) The designated officer shall begin his investigation as soon as possible, and in any event within 24 hours after being notified of a suspected offense. He shall discuss the matter with the person reporting the incident and with the inmate or inmates accused. Where necessary to ascertain the true facts, he should interview other witnesses, make searches, and employ other appropriate investigatory techniques.

(2) When the investigating officer is satisfied he has learned the relevant facts, he may dismiss the charges if he concludes that the facts do not justify further proceedings. In that event, he shall explain his action to the person reporting the suspected offense and also to the inmate accused.

(3) If the investigating officer concludes that the facts found do justify further proceedings, he shall obtain written and signed statements from the person reporting the suspected offense, from the suspected offender, and from the other persons providing pertinent information.

(4) The accused inmate shall be advised by the investigating officer that he is entitled to have written statements from his witnesses but the number will be limited to avoid useless repetition of the same substance. When statements are not taken from all of his witnesses, the investigating officer shall record their names with an explanation for not taking their statements.

(5) The investigation officer shall make written notes of any observations made by him during the course of the investigation which directly relate to the alleged offense, and he shall take under his control any physical evidence available.

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STATE OF NORTH CAROLINA
DEPARTMENT OF CORRECTION
DIVISION OF PRISONS

POLICIES – PROCEDURES

SUBJECT: DISCIPLINARY PROCEDURES

TAB: 5 NCAC 2B
INMATE CONDUCT RULES, DISCIPLINE

NO.: .0200

Upon completion of the investigation, this officer shall make such changes in the status of the accused as seem warranted by the facts found.

(6) The results of the investigation shall be presented to the superintendent as soon as possible. If more than 48 hours are required to make the investigation and present the results, authority to extend the time shall be obtained in writing from the unit superintendent or institution head who shall establish the time period of extension.

(d) Definitions. The word "unit" used in this article is to be understood to refer to any confinement facility of the Division of Prisons. The term "superintendent" will be interpreted as including the warden at Central Prison.

History Note: Statutory Authority G.S. 148.11;
Effective February 1, 1976.

.0202 DISPOSITION BY SUPERINTENDENT OR HIS REPRESENTATIVE

(a) The superintendent shall first determine whether the investigation report indicates that he may dispose of the matter by counseling the inmate or inmates concerned. The investigation report in such cases shall be filed at the unit together with a signed statement regarding the superintendent's action.

(b) If the superintendent or his designated representative decides formal disciplinary action is required, he shall fill out an offense report. He shall make such changes in the status of the accused as he feels appropriate pending a hearing on the matter, but if the inmate is placed or continued in administrative segregation or denied any privileges, the superintendent shall so note in the case record with an explanation for his decision.

(c) The superintendent or his designated representative shall make a preliminary determination as to whether the alleged offense shall be classified as minor or major. He shall be guided in this regard by the classification of offenses in Article 3. If he decides that an offense classified as minor in Article 3 shall be dealt with as a major offense in a given case, he shall state in writing the matters in aggravation that he deems to justify such handling; if he decides that an offense classified as major in Article 3 shall be dealt with as a minor offense, he shall state in writing the matter in mitigation that he deems to justify this decision. He shall sign this statement and include it in the case records.

(d) When the superintendent or his designated representative decides than an accused is to be dealt with by formal disciplinary action, he shall give the accused notice in writing of the charge including a statement of the misconduct alleged and of the rules this conduct is alleged to violate. If the offense charged is classified as minor by the superintendent or his designated representative, he shall ask the accused whether he admits guilt. If so, the superintendent or his designated representative,

DISTRIBUTION:

| ISSUED BY: | APPROVED BY: | DATE ISSUED | SUPERSEDES ISSUE DATED | PAGE |
|---|---|---|---|---|
| Dir. Div. of Prisons | Sec. of Correction | 1-5 | | 2B-4 |

shall allow the offender to make a statement. The substance of the statement shall be summarized in the record. The superintendent or his designated representative, shall then decide on the disposition. He may impose any measure authorized as a disposition for minor offenses, or he may suspend such imposition on condition of good behavior for a stated period of time not to exceed three months. He shall note his decision on the offense report.

(e) If the accused denies guilt where a minor offense is charged, the superintendent shall order the accused to appear before a unit disciplinary committee. Where major infractions are alleged, the matter will be referred to an area disciplinary committee. Referrals to a disciplinary committee should be made by the superintendent or his designated representative within 48 hours after he receives the investigation report. In any case where this is not possible, the reason for the delay shall be explained in writing by the superintendent or his designated representative, and his signed statement respecting this shall be made a part of the case record.

History Note: Statutory Authority G.S. 148.11;
Effective February 1, 1976.

.0203 DISCIPLINARY COMMITTEES

(a) Unit Disciplinary Committee

(1) The superintendent shall appoint one or more disciplinary committees from the staff of his unit to hear and determine the disposition of minor offenses charged against inmates assigned to his unit. These committees shall be composed of three members chosen so as to provide a balanced and impartial tribunal. No person who initiates the charges to be heard or who is a witness in the case may be a member of the committee to which the case is referred. The superintendent shall designate one member to serve as chairman. The appointments and designations shall be made subject to the approval of the area administrator.

(2) The Chairman of a unit disciplinary committee to which a case has been referred shall arrange for a hearing on the charge within 48 hours after the referral. The accused shall be brought before the committee and confronted with the facts established by investigation reports which tend to support the charge against him. The accused shall be permitted to assert a defense or otherwise explain his conduct. The chairman may summon to testify any witnesses or other persons with relevant knowledge of the incident, and may allow the accused to question any person so summoned.

(3) If guilt is established by substantial evidence, the unit disciplinary committee may impose one or more measures authorized as a disposition for minor offenses. The committee may suspend such inposition on condition of good behavior







for a stated period of time not to exceed three months. Its decision shall be noted in the record and certified by the chairman.

(b) Area Disciplinary Committee

(1) Each area administrator shall appoint one or more area disciplinary committees from personnal within his command if a balanced and impartial tribunal can be provided in this manner. There shall be not less than three nor more than five members. No person who initiates the charges to be heard, or who is a witness in the cases, or who is on the staff of the unit to which the accused is assigned may be a member of the area disciplinary committee to which the case is referred. The area administrator shall designate one member to serve as chairman.

(2) Cases referred to an Area Disciplinary Committee shall be scheduled for a hearing within seven days of the referral. The accused shall receive not less than 72 hours prior to the hearing, written notice of the charge or charges against him, unless such 72 hour notice be waived in writing by the accused. If a delay for any other reason is desired by the unit superintendent or his designated representative or the accused, the one desiring the delay shall state his reason in a written request to the Area Administrator who may grant such a delay for good cause.

(3) The Unit Superintendent shall insure that the investigation report, all written statements and any other pertinent items of information or evidence are properly compiled for presentation to the Committee, and that the accused and all needed witnesses are available at the time and place of the hearing.

(4) The Unit Superintendent may appoint a member of his staff to present the case to the Area Disciplinary Committee. The accused may request that a particular member of his unit's staff be appointed to represent him. The Unit Superintendent should allow this request unless the accused requests one of his accusers or other inappropriate person, in which event the Superintendent shall appoint another staff member. The chosen or appointed representative should actively assist the accused both in preparing for the hearing and at the hearing.

(5) If the chosen or appointed representative has prior knowledge that the accused is guilty, he should inform the accused of that fact so that another staff member may be chosen if desired. Still, an appointed or chosen staff member can and should aid the accused in gathering and presenting evidence, even though he thinks that the accused is probably guilty.

(6) The Chairman of the Area Disciplinary Committee shall begin

the hearing by reading the charges to the accused and asking him whether he admits committing the offense. If the accused denies guilt, the evidence bearing on this issue shall be presented. Written statements of the facts of the incident as gathered by the investigating officer may be used wherever necessary, particularly where more than one witness is to testify to a specific fact in issue. If the primary accuser is not present and the chairman feels that the committee cannot make a fair decision without elaboration on his statement or confrontation and cross-examination by the accused, he shall order that the hearing be delayed until the accuser can be present. Likewise, if it is necessary for a witness of the accused to appear for questioning, the Chairman shall postpone the hearing until that witness can be present. If the Chairman deems it necessary to withhold the identity of the primary accuser or any other witness due to the threat of reprisal, the accused shall be informed of the testimony or statement of the witness without disclosing his identity. The accused shall be given an opportunity to refute or explain evidence against him and to present evidence and make a statement in his own behalf.

(7) After all evidence relating to guilt or innocence has been presented, the Chairman will have the room cleared of all persons who are not voting members of the committee, except uninvolved people permitted to observe committee deliberations for educational or training purposes. If the committee does not feel that a proper decision can be reached on the basis of the information at its disposal, the Chairman may reopen the hearing for additional questioning, postpone the hearing for one week in an attempt to obtain additional information, or dismiss the charges.

(8) Upon reaching a decision as to the guilt or innocence by majority vote, the Chairman shall enter the committee's findings and rationale on the record and reopen the hearing to advise the inmate of the decision. If he has been found guilty or if admits guilt or if admits guilt when the charges are read, the committee should hear any matter pertinent to the issue of proper disposition and then close the hearing for deliberation on this issue. Upon reaching a decision by majority vote as to the disposition and having noted the reasons for this determination on the record, the Chairman shall reopen the hearing to advise the inmate of the decision, inform him of the fact that it will be reviewed, and permit him to have entered on the record any objections he may have to the decision. The Chairman shall explain to the inmate that if he voices an objection, any punitive aspect of the decision will not take effect until the case is reviewed and the punishment is approved by the reviewing authority, while if no objection is made the decision will take effect immediately but be subject to being overturned or amended by the reviewing authority.









(9) If the accused admits guilt or if he is found guilty of a minor offense by the area disciplinary committee, the committee may impose one or more of the measures authorized for minor offenses. If he admits guilt or if he is found guilty of a major offense by the area disciplinary committee, the committee may impose one or more of the measures authorized for minor offenses and in addition or in lieu thereof one or more of the measures authorized for major offenses. The committee may suspend such imposition on specified conditions for a stated period of time not to exceed six months.

(10) The Chairman of the committee shall be responsible for insuring that all forms are properly completed. The inmate shall be entitled to a copy of a written statement of the evidence relied on by the committee. Certain items of evidence may be excluded if necessary to protect a witness or informant from reprisal. Copies of forms DC-138 and DC-138(c) shall be forwarded to Combined Records and placed in the inmate's headquarter jacket. The originals of these forms will be placed in the inmate's field jacket.

History Note: Statutory Authority G.S. 148.11;
Effective February 1, 1976.

.0204 REVIEW PROCEDURES

(a) A review of all actions by disciplinary committees shall be made by the appointed authorities within seven days of the committee's decision.

(b) The review should be directed to the consideration of whether the record indicates that the proper procedures were followed during the course of the investigation and hearing, and whether the inmate received a substantively full and fair hearing. The reviewing authority should not substitute his judgement for that of the committee's unless it is necessary to do so in order to correct a prejudicial abuse of procedures or to remedy a clearly erroneous and unfair decision.

(c) The reviewing authority is authorized to:

(1) Approve the committee's decision.
(2) Order a re-hearing in whole or in part.
(3) Disapprove the committee's decision and dismiss the case.
(4) Reduce, but not increase, any punitive aspect of the committee's decision.
(5) Modify any administrative or treatment decision made by the committee.

(d) The reviewing authority will enter on the record his reasons for taking any action other than approving the committee's decision.

(e) The unit and the inmate concerned shall be notified of the reviewing authority's decision without delay.

(f) The full record of the case will be filed at the location of the reviewing authority.

(g) The decision of the reviewing authority may be appealed in writing directly to the Director of Prisons or his designee. His decision is not subject to further review.

.0205 AUTHORIZED DISCIPLINARY PROCEDURES

(a) For minor offenses arising out of a single incident, one or more of the following are authorized:

(1) Reprimand

(2) Suspension of one or more privileges for a period not to exceed 30 days. No privileges may be suspended which the Superintendent cannot on his own authority grant (e.g., work release). Privileges which may be suspended include but are not limited to yard privileges, recreational activities, and use of the canteen.

(3) Extra duties. The total hours of extra duty shall not exceed 40 and nor more than four hours shall be performed on any working day and no more than eight hours on other days. The total period over which the extra duty extends should not exceed 30 days.

(b) For major offenses arising out of a single incident one or more of the measures authorized for minor offenses may also be imposed and in addition or in lieu thereof one or more of the following:

(1) Confinement in punitive segregation for a period not to exceed 15 days. If the conditions of confinement in administrative and punitve segregation are identical, any time spent in administrative segregation pending the disciplinary hearing will be credited toward the total period of confinement in punitive segregation.

(2) Loss of up to 30 days time earned by previous good conduct.

(3) Loss of any or all minimum custody privileges (work release, study release, home leave, community volunteer leave, and all authorized outside activities) or loss of minimum custody status. Only the Area Disciplinary Committee may take punitive level adjustments. The appropriate review date of level adjustment may be determined by the Area Classification Committee according to the inmate's behavior following the infraction. If the inmate is to be demoted out of minimum custody, he will be referred to an Area Classification Committee for reassignment in accordance with departmental procedures.

(c) For each unrelated offense charged at the same hearing, additional punishment may be imposed in accordance with these rules, but the total period of segregated confinement for such offenses may not exceed 30 days. Inmates confined for consecutive periods shall be released into the general







population at the expiration of the first one to fifteen day period for an interim period of 48 hours unless the written justification is submitted to the area administrator or institution head. This justification must indicate concrete reasons that the inmate consitutes and escape risk or other wise is a clear threat to order and security.

(d) Inmates who commit infractions on segregation may be confined in punitive segregation for additional periods of one to fifteen days. They must be released into the general population at the end of each fifteen day period for 48 hours unless written justification is submitted by the area administrator or institution head in accordance with the procedures outlined in Section 2-408(c).

History Note: Statutory Authority G.S. 148.11;
Effective February 1, 1976.

.0206 MODIFICATIONS

(a) The Director of the Division of Prisons may authorize modifications of this procedure consistent with its fundamental principles, provided any modification shall be in writing, approved by the Secretary of Correction, and incorporated in the policies and procedures of the Department.

(b) In accordance with this section, the composition of the "area disciplinary committee" in major institutions is hereby modified. The Director of Prisons shall provide that such hearings be held by a disciplinary committee appointed by the Institution Head or his designated representative. No person who initiates the charges or who is a witness in the case may be a member of the area disciplinary committee. Likewise, no one in a position of direct supervision over the accused may serve on the committee.

History Note: Statutory Authority G.S. 148.11
Effective February 1, 1976.

STATE OF NORTH CAROLINA
DEPARTMENT OF CORRECTION
DIVISION OF PRISONS

SUBJECT: LIST OF INFRACTIONS

POLICIES – PROCEDURES

TAB: 5 NCAC 2B
INMATE CONDUCT RULES, DISCIPLINE

NO. .0300

.0301 GENERAL

The following rules govern the conduct of inmates under the custody of the Department of Correction:

(1) Attitude Toward Officials. When in the presence of any state official or any member of the prison staff, inmates maintain an attitude of attention and respect.

(2) Obedience to Orders. All inmates will obey promptly and properly any lawful order given them by members of the prison staff.

(3) Work. Any inmate physically and mentally able to work may be assigned employment suitable to his capacity. Each inmate will be expected to work diligently and conscientiously to perform the tasks assigned as well as he is able. Inmates will work steadily at the job they are assigned until ordered to cease by the official in charge. They will not engage in any other activity unless granted permission to do so by the official in charge. If sick or unable to perform the work assigned, an inmate will report the fact at once to the official in charge. Malingering, shirking, laziness, or carlessness will not be tolerated.

(4) Care of Living Quarters. Inmates will keep their living quarters in a neat, clean and sanitary condition. All authorized clothing and personal effects will be neatly hung or stored in designated places, and no containers for personal effects will be permitted other than those approved by the officer in charge.

(5) Personal Cleanliness. Inmates will observe the ordinary requirements of personal hygiene, bathe and shave as often as necessary, keep teeth clean, and hair neatly cut and properly groomed.

(6) Clothing. Inmates will possess and wear prison clothing only for the grade in which they are classified. This clothing will not be mutilated in any way and will be maintained in as presentable a condition as available facilities permit. Inmates are strictly forbidden to exchange articles of clothing or to possess unauthorized clothing.

(7) Contraband. Except as specifically authorized for a proper purpose and under adequate supervision, no inmate will have in his possession or under his control any weapon, instrument or tool that could be used to effect an escape or to aid him in an assault or insurrection; any intoxicant or any controlled substance except as prescribed by a licensed physician; any playing cards, dice, or other games of chance; any obscene material; or any unauthorized article of property.

(8) Bartering and Trading. Inmates will not barter or trade with each other nor with officers or employees, except as specifically authorized by law or regulation. No inmate will be allowed to receive compensation for legal services rendered.

(9) Misuse of Prison Supplies. Inmates will not waste, appropriate, or traffic in prison supplies. No food will be taken from the dining room, kitchen, or storerooms of any prison without proper authorization.

(10) Gambling. Gambling of any nature is prohibited.

DISTRIBUTION:

| ISSUED BY: | APPROVED BY: | DATE ISSUED | SUPERSEDES ISSUE DATED | PAGE |
|---|---|---|---|---|
| Dir. Div. of Prisons | Sec. of Correction | 23 | | 2B-11 |



STATE OF NORTH CAROLINA
DEPARTMENT OF CORRECTION
DIVISION OF PRISONS

SUBJECT: LIST OF INFRACTIONS

POLICIES – PROCEDURES

TAB: 5 NCAC 2B
INMATE CONDUCT RULES, DISCIPLINE

NO. .0300

(11) Disorderly Conduct. Inmates will at all times behave in an orderly manner. Fighting, wrestling, or physical encounters of any kind other than those permitted by the authorized recreation program are prohibited. Belligerent, aggressive, threatening or other conduct which might lead to violence will not be tolerated.

(12) Offensive Language. Inmates will not use profane, vulgar or obscene language. No loud or boistarous talking will be permitted in the dining halls during meals, nor will any talking be permitted in the cell blocks after lights have been dimmed for the night. Booing, whistling, or shouting by individuals or groups is forbidden, except that shouts of encouragement to participants in authorized athletic contests may be permitted. The making of sarcastic or insulting remarks to or about other inmates or members of the prison staff will be cause for disciplinary action.

(13) Agitating. Inmates will not agitate or provoke distrubances.

(14) Night Rules. No inmate will fail to go to bed when the lights are dimmed for the night, or get up during the night, except as authorized by the sleeping quarters rules or special instructions of the officer in charge of the unit, or unless the inmate obtains permission from the staff member on duty in the sleeping quarters of the inmate.

(15) Immorality. Any committing, soliciting or inciting others to commit any sexual act will be subject to disciplinary action.

History Note: Statutory Authority G.S. 148.13; 148.11;
Effective February 1, 1976.

.0302 MAJOR OFFENSES

The following will be dealt with as major offenses unless the presence of matters in mitigation justify handling as minor offenses:

(1) Directing toward any state official, any member of the Prison Staff, or any member of the general public, language that is generally considered profane, contemptuous, or threatening, or by a specific gesture or act demonstrating marked disdain, insolence, or impertinence with reference to such persons;

(2) Willfully disobeying, or failing to obey promptly and properly or causing another inmate to disobey or fail to obey promptly and properly, any lawful order of a prison official or employee, or any other lawful order to which subject;

(3) Participating actively or passively in a mutiny, riot or insurrection.

(4) Inciting others to riot or participate in a mutiny or insurrection;

(5) Seizing or holding as a hostage, or in any manner unlawfully detaining any person against his will;

(6) Committing an assault upon the person of another with a deadly weapon or any means likely to produce bodily injury;

(7) Committing an assault upon the person of another with a blunt instrument; by stabbing; by cutting; with intent to commit a sexual act;

(8) Possessing or having under his control any weapon or any instrument to

DISTRIBUTION:

| ISSUED BY: | APPROVED BY: | DATE ISSUED | SUPERSEDES ISSUE DATED | PAGE |
|---|---|---|---|---|
| Dir. Div. of Prisons | Sec. of Correction | 23 | | 2B-12 |

| STATE OF NORTH CAROLINA DEPARTMENT OF CORRECTION DIVISION OF PRISONS | SUBJECT: LIST OF INFRACTIONS | |
|---|---|---|
| POLICIES – PROCEDURES | TAB: 5 NCAC 2B INMATE CONDUCT RULES, DISCIPLINE | NO.: .0300 |

effect an escape or to aid him in assault or insurrection;
(9) Making, drinking, or possessing alcoholic beverages;
(10) Possessing, using or selling narcotics or controlled substances;
(11) Exchanging articles of clothing or possessing unauthorized clothing;
(12) Intentionally inflicting self-injury for the purpose of avoiding work;
(13) Aiding or abetting any other inmate in the willful act or intentional act of inflicting self-injury resulting in a permanent or temporary incapacity to perform work or duties assigned;
(14) Offering or accepting a bribe; accepting compensation for legal assistance;
(15) Stealing;
(16) Soliciting, committing, or inciting others to commit any sexual act;
(17) Escaping, attempting to escape, or aiding other inmates to escape or attempt to escape;
(18) Willfully damaging, destroying or losing state property, or property belonging to another;
(19) Unauthorized leave;
(20) Committing an assault upon the person of another by fighting (fists, kicking, any bodily contact without use of instruments); throwing hot liquids; use of firearms.

History Note: Statutory Authority G.S. 148.11; 148.13;
Effective February 1, 1976.

.0303 MINOR OFFENSES

The following will be dealt with as minor offenses unless the presence of matters in aggravation justify handling as major offenses:
(1) Failure to keep living quarters in a proper condition;
(2) Personal untidiness;
(3) Feigning physical or mental illness or disablement for the purpose of avoiding work;
(4) Negligently failing to perform assigned duties or performing them in a culpably inefficient manner;
(5) Possessing contraband not constituting a threat of escape or a danger of violence;
(6) Possessing funds in a form other than that authorized by Prison Department policies or in excess of the authorized amount;
(7) Bartering or trading;
(8) Misusing prison supplies;
(9) Gambling;
(10) Disorderly conduct;
(11) Using offensive language;
(12) Agitating;
(13) Failing to go to bed when lights are dimmed, or getting up during the night without securing permission of the night guard;
(14) Damaging, destroying, or losing prison property through neglect;





| STATE OF NORTH CAROLINA DEPARTMENT OF CORRECTION DIVISION OF PRISONS | SUBJECT: LIST OF INFRACTIONS | |
|---|---|---|
| POLICIES – PROCEDURES | TAB: 5 NCAC 2B INMATE CONDUCT RULES, DISCIPLINE | NO.: .0300 |

(15) Violating censorship regulations.

History Note: Statutory Authority G.S. 148.11; 148.13;
Effective February 1, 1976.

.0304 OTHER RULES AND REGULATIONS

(a) Crimes. In addition to being subject to prison rules and regulations and to the punishments therein provided, inmates are subject to the criminal law of the State and are liable to all penalties thereunder. Included among offenses made criminal by law are: murder, manslaughter, assaults, kidnapping and taking hostages, arson, insurrection, escape, carrying concealed weapons, resisting officers, injuring or destroying public property, stealing, bribery, gambling, unlawful possession or use of narcotic drugs or implements, unlawful possession of intoxicants, crime against nature, conveying messages and weapons to or trading with convicts and other prisoners, subversive activities aimed at the overthrow of the government of the United States or of the State of North Carolina or any of its political subdivisions by force, or violence, or by any other lawful means, inflicting or assisting in infliction of self-injury resulting in incapacity for an inmate to perform assigned duties.

(b) Escape. Inmates who escape while participating in work release, study release, home leave, or any other program authorized under G.S. 148.4 will not be prosecuted in court for that escape if:
(1) The offense is the inmate's first escape from an unsupervised authorized activity while serving this sentence or any previous sentence.
(2) The inmate returns to custody voluntarily within 24 hours of the time he was ordered to return.

Escapees within this category remain subject to administrative disciplinary action for the offense.

(c) Punishment for Crimes. Except as provided above, inmates who commit an offense made criminal by law will be taken to court for trial and punishment. Crime against nature and taking of hostages for felonies are punishable by a maximum of ten years imprisonment. A conviction of kidnapping carries a penalty of life imprisonment. Convictions of escape offenses carry penalties as follows:
(1) First escape or attempt by a misdemeanant (misdemeanor) - three months to one year;
(2) First escape or attempt by a felon (felony) - six months to two years;
(3) Second or subsequent escape or attempt by any inmate (felony) - six months to three years;
(4) Aiding or assisting an escape or attempt (misdemeanor) - at the discretion of the court.

History Note: Statutory Authority G.S. 14.1 through G.S. 14.437; G.S.148-45;
Effective February 1, 1976